

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

COMBUSTION ENGINEERING, INC.,)

Plaintiff/Counterclaim)

Defendant)

v.)

MILLER HYDRO GROUP,)

Defendant/Counterclaim)

Plaintiff)

v.)

Civil No. 89-0168 P

KANSALLIS-OSAKE-PANKKI,)

Party-in-Interest)

and)

ALDEN RESEARCH LABORATORY,)

INC.,)

Counterclaim Defendant)

**RECOMMENDED DECISION ON COUNTERCLAIM-DEFENDANT
ALDEN RESEARCH LABORATORY, INC.'S MOTION TO DISMISS**

This diversity action arises out of an alleged breach of a hydro-power generating plant construction contract. Now before the court is the motion of counterclaim-defendant Alden Research Laboratory, Inc. ("Alden")¹ to dismiss the counterclaim of defendant Miller Hydro Group ("Miller Hydro") against it for failure to state a claim. The gravamen of the counterclaim is Miller Hydro's

¹ Alden was not an original party to this litigation but was made a counterclaim- defendant pursuant to Fed. R. Civ. P. 13(h).

assertion that Alden negligently breached its duty to test the hydroelectric generating plant impartially, in good faith and in a manner consistent with the terms of the construction contract. *See* Answer and Counterclaim, Count VII; Defendant Miller Hydro Group's Opposition to the Motion to Dismiss Counterclaim Against Alden Research Laboratory, Inc. at 3. Alden argues that no claim against it lies because the construction contract does not obligate the defendant to accept Alden's testing results.

On a motion to dismiss, the material factual allegations of the complaint must be taken as true, *Cooper v. Pate*, 378 U.S. 546 (1964), and interpreted in the light most favorable to the pleading party, *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 25 (1st Cir. 1987). The motion may be granted ``only if, when viewed in this manner, the pleading shows no set of facts which could entitle [the pleader] to relief." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988) (citing *Conley v. Gibson*, 355 U.S. 41, 45-48 (1957)). Applying these guidelines, the material facts are as follows: On or about October 1, 1985 Miller Hydro and plaintiff Combustion Engineering, Inc. (``Combustion") entered into a turnkey construction contract (``contract") for the design, engineering, construction and start up of a hydroelectric project (``project") located in Lisbon Falls, Maine. Counterclaim §§ 1, 4. The contract went through several amendments; the final written expression of the agreement is dated April 15, 1986, although several handwritten changes and additions were made to the contract between April 15, 1986 and May 29, 1986. Counterclaim § 5. The final contract requires, *inter alia*, that the project have a total hydraulic flow capacity of approximately 7800 cubic feet per second and a generating capacity of approximately 14 megawatts. Counterclaim §§ 11-12. The contract further states that upon completion of the project Combustion was to receive an incentive bonus ``[i]f, at Final Acceptance, the annual output of the Facility . . . is greater than 77,500,000 kilowatt-hours." *See* Contract § 22.1 (found at Exh. A to Answer and Counterclaim to First Amended Complaint and Defendant's Demand for a Jury Trial). Annual output was to be determined ``on the basis of the tests

described in Article XIII and the calculation set forth in Exhibit 14-13.3." *Id.* Article XIII of the contract sets forth the testing procedure for preliminary acceptance and requires that:

Performance and Availability testing . . . be performed by a qualified independent tester acceptable to [Miller Hydro] and to [Combustion]. The independent tester will be responsible for selection of test methods, including any necessary variations from Exhibit 14-13.3 due to site conditions, subject to the consent of [Miller Hydro] and [Combustion]. These test methods and tolerances allowed shall be stipulated before testing starts.

Id. at & 13.4; *see also* Contract Exhibit 14-13.3 & 3(a) (attached as Exh. D to Answer and Counterclaim to First Amended Complaint and Defendant's Demand for a Jury Trial).

The contract also provides that "[t]he equipment will be inspected by [Miller Hydro] and [Combustion] prior to the tests. [Combustion] must notify [Miller Hydro] 15 days in advance of each test so that [Miller Hydro] may have a representative present." *Id.* at & 13.5(c); *see also* Contract Attachment A & 2.3 to Exhibit 14-13.3. Exhibit 14-13.3 to the contract states that the minimum² annual productivity of the facility is to be 75,000 megawatt-hours predicated on measurements taken "at the generator leads, based on 2 turbines with a design net head of 27 ft. and total flow of 7800 [cubic feet per second]." *See* Exhibit 14-13.3 at & 1(a). The independent tester was required to prepare a test report

summarizing [&] 3.a, the data collected during the tests, the transformation of the data to rated conditions, and his findings and submit the report to [Combustion] and [Miller Hydro]. Within 14 days following receipt of the performance test report, [Combustion] and [Miller Hydro] shall report any deficiencies noted in the report to the Independent Tester.

Id. & 3(h). Miller Hydro was not required to accept the test results.

² Paragraph 16.5 of the contract requires that the project have a minimum annual output of 75,000,000 kilowatt-hours per year. *See* Contract & 16.3.

In the event that [Miller Hydro] does not accept [Combustion's] test results,³ then such tests as are considered necessary will be performed by a mutually agreed upon third party. Both [Combustion] and [Miller Hydro] agree to share equally the cost for such tests and to accept the third party's test results as final.

Id. at Attachment A & 1.3.

The equipment installed in the project has capacities significantly in excess of the contractual requirements: its rated hydraulic capacity is approximately 9040 cubic feet per second and its name-plate generating capacity is approximately 19.06 megawatts. Counterclaim && 14, 16-17. Combustion engaged Alden as the independent tester to perform the annual productivity tests required by the contract. *Id.* & 63. Combustion directed Alden to compute the annual productivity of the project based upon the performance of the two installed turbines. Counterclaim & 67. Alden conducted the tests upon equipment having a rated hydraulic capacity in excess of 7800 cubic feet per second. Counterclaim & 76. Combustion used Alden's test results to calculate its incentive bonus totaling \$8,160,000. Counterclaim & 79.

In its counterclaim Miller Hydro effectively alleges that it is a third-party beneficiary to the contract between Alden and Combustion. It asserts that Alden owed it three duties: (i) to perform the required productivity tests in accordance with the contract between it and Combustion; (ii) to undertake and complete the tests independently and free from the influence and direction of Combustion; and (iii) of good faith and fair dealing. Counterclaim && 72-74. Miller Hydro claims that Alden breached its duties because it ``agreed to be subservient to Combustion's directions[] in the making of purported computations for annual productivity under the contract[] . . . fail[ed] to conduct

³ Under the contract Combustion is responsible for completion of acceptance tests. *See* Contract & 2.1(j).

the productivity tests in conformity with the requirements of the Contract[;] . . . [and] improperly conduct[ed] such tests under the influence and direction of Combustion." Counterclaim & 65, 77-78.

In Maine, in the proper circumstances, "`a third person may sue on a contract to which that person was not a party." *Martin v. Scott Paper Co.*, 511 A.2d 1048, 1049 (Me. 1986). "`In order for the beneficiary to enforce the contract, however, the promisee must intend that the beneficiary receive the benefit of the promised performance." *Id.* at 1049-50; *see also Restatement (Second) of Contracts* ' 302(1)(b) (1981). In such cases the promisor owes the beneficiary a duty to perform the promise. *Restatement (Second) of Contracts* ' 304. The facts alleged in the counterclaim, read in the light most favorable to Miller Hydro, clearly indicate that Combustion intended Miller Hydro to benefit from Alden's performance of the independent tests and that Alden may have breached its duties by failing to perform the tests in accordance with the contract, independently and in good faith. In addition, Miller Hydro's factual allegations are sufficient to sustain its claim that it relied to its detriment on the testing performed by Alden and that it was harmed by Alden's negligent performance of those tests. Here it clearly appears, according to the facts alleged, that Miller Hydro may be entitled to recover under some viable legal theory. *See Correa-Martínez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990). Citing to & 1.3 of Attachment A to Exhibit 14-13.3 of the contract,⁴ Alden argues that its motion to dismiss should be granted because Miller Hydro was not obligated to rely on its test results and

⁴ This paragraph of the contract states:

In the event that [Miller Hydro] does not accept [Combustion's] test results, then such tests as are considered necessary will be performed by a mutually agreed upon third party. Both [Combustion] and [Miller Hydro] agree to share equally the cost for such tests and to accept the third party's test results as final.

Id.

therefore suffered no detriment. That conclusion, however, is not compelled by the pleadings. Accordingly, I conclude that the facts alleged in Miller Hydro's counterclaim are sufficient to state a claim against Alden and therefor recommend that Alden's motion to dismiss the counterclaim against it be **DENIED**.⁵

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 30th day of July, 1990.

David M. Cohen
United States Magistrate

⁵ Miller Hydro advanced essentially the same facts and legal theories in its proposed amended counterclaim as it did in its original counterclaim. Although I denied that motion as untimely, see Memorandum Decision and Order on Defendant's Motion for Reconsideration (Docket No. 87), I concluded that had the motion been timely filed the amendment would have been allowed. Thus, the outcome of this motion to dismiss would not have been affected by that amendment.